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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. ZACHARIAH JOSEPH FARRELL, Defendant and Appellant.	C059765 (Super. Ct. No. 02F8421)

In November 2002, defendant Zachariah Joseph Farrell shot and killed his father Bernard Farrell as he emerged from his residence. In the first trial, a jury convicted defendant of second degree murder (Pen. Code, § 189),[1] with enhancements for infliction of great bodily injury with a firearm (§ 12022.53, subd. (d)), and use of a firearm (§ 12022.5, subd. (a)).

In 2007, this court reversed the judgment, based upon ineffective assistance of counsel. (*People v. Farrell* (Oct. 15, 2007, C052289) [nonpub. opn.].) Following our remittitur, defendant was retried. This time, the jury

[1] Undesignated statutory references are to the Penal Code.

acquitted defendant of murder but convicted him of voluntary manslaughter (§ 192, subd. (a)), and found true an enhancement for personal discharge of a firearm (§ 12022.5, subd. (a)). Defendant was sentenced to an aggregate total of 10 years in state prison. He appeals.

Defendant's assignments of error this time around include prosecutorial misconduct, improper denial of a motion for mistrial, and instructional and evidentiary error. None of them has merit. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Family history

Defendant's parents, Bernard Farrell and Lynda Kersey, were married for about 20 years. They had four children, defendant and his three younger sisters. As of November 4, 2002, Bernard and Lynda[2] were living separate and apart while their divorce was pending.

Bernard's personality was "very volatile." He suffered from depression and bipolar disorder. He took antidepressant medication for his condition and smoked marijuana regularly. He also had a problem with alcohol abuse. When Bernard drank, he would become angry, physically abusive and violent. On numerous occasions, Bernard engaged in acts of explosive rage toward

[2] We refer to family members by their first names for convenience only. No disrespect is intended.

family and neighbors. His marriage to Lynda was marred by frequent episodes of drinking and fighting.

Defendant often intervened when his father went off the deep end. When defendant was five years old, he saw Bernard punching and kicking his mother. He seized a baseball bat and threatened Bernard with it, effectively putting an end to the assault. In another instance, when Bernard pulled a gun on Lynda during an altercation, defendant drew his own gun and held his father at bay until the police arrived.

On occasion, defendant would allude to the possibility that he might someday have to kill his father.

The day of the shooting

As of November 4, 2002, Lynda was living with her three daughters in Redding, while Bernard resided in his own residence in Whitmore. Defendant had moved in with his mother after going AWOL from the Marine Corps.

On the morning of the killing, Bernard telephoned Lynda's residence about 15 times. During the calls, Bernard's tone became very threatening. He asked for Lynda, but was told she was not home. Bernard then ranted about Lynda "cheating" on him and threatened to "get" her. He also called defendant a "lazy ass" a "little bitch," and a "deserter." At the end of this conversation, Bernard told defendant that if he came up to his residence, he would shoot him.

Defendant told his sisters that their dad was acting up again and instructed them to go to their grandparents'

residence. He told his sister Marie that he was going to go over to Bernard's residence and that "something bad might happen." Marie pleaded with him not to go, but he told her he had to.

Defendant went to his maternal grandparents' house at about 2:00 p.m. that afternoon. When he arrived, Marilyn Thomas, his maternal grandmother, was listening to a rambling, profanity-laced message from Bernard on her answering machine. After hearing the message, defendant went to the back of the house, where he retrieved a 12-gauge shotgun. Marilyn pleaded "Zach, no," but defendant replied, "[G]randma, I'm sorry," and left. Marilyn immediately called 911 and apprised the operator of the situation. She said she feared defendant was going to do something serious to his father or to himself.

In response to the call, Shasta County Sheriff's Deputy Lance Highet drove up to Bernard's residence. When he informed Bernard about Marilyn's call, Bernard said he "was not concerned." He told Highet if defendant showed up, he would just go out the back door. Highet told Bernard that if defendant showed up, he should stay inside and call 911. He also advised him that he had a right to defend himself. Soon thereafter, Bernard sent a text message to his sister, Cynthia Morff, saying that "the cops were after Zack [defendant]," that Zack had threatened to kill him and that he would call her back.

On the same afternoon, Bernard called up a neighbor, Steven Snyder, and invited himself over for a drink. A few days

earlier, Snyder had given Bernard a box of .22-caliber rifle shells, because Bernard claimed he had used up all his ammunition and had nothing to protect himself.

Bernard arrived at Snyder's house, where they drank scotch. Bernard was very despondent. He started sobbing, saying his marriage was over, his kids hated him and he wanted to commit suicide, but did not have strong enough rope. Several times Bernard told Snyder "[t]his is the day I want to die," or "[t]his is the day I'm going to die."

The shooting of Bernard

Around 5:25 p.m., Morff called Bernard, who was "in despair" and sobbing uncontrollably, because the police had told him that his son was on his way up to the property to shoot him. The conversation lasted about 30 minutes. Just before it ended, Morff heard Bernard's dog bark. Bernard told her he thought that meant defendant was outside the house. Bernard said he was going to go outside to talk to defendant and would call her back. Those were the last words she ever heard from him.

At 5:59 p.m., defendant called 911 and told the dispatcher he had just shot his father, and "[h]e's dying on me." Defendant explained that Bernard had come out of the house and tried to shoot him first, but that he (defendant) "got him in the shoulder . . . from the back." He explained that his father had been "threatening [his] mom and threatening [his] sisters," and had threatened him that day so defendant had come to the property to talk to his father. He told the operator that

Bernard had shot at him with a ".22," and that his shotgun and his father's rifle were both inside the house.

Defendant's version of the shooting

Defendant was taken into custody, where he gave three interviews to sheriff's detectives, which were transcribed and played for the jury. The interviews were largely consistent with his trial testimony, with notable exceptions that will be discussed.

Defendant testified that on the morning of the shooting, Bernard kept calling his mother's house, asking for her, and being told she was not home. As the calls continued, Bernard became more and more agitated. Defendant recognized that Bernard's mental state was "changing." Defendant believed "[h]e's getting real aggravated, he's getting depressed, he's getting angry at somebody. So, it's a warning sign for me to--like, wow, he's really flipping out right now."

Defendant testified that he tried to reason with his father on the phone but was getting nowhere, so he told Bernard he was coming out to visit him. Bernard replied, "Don't come up here, I'll shoot you."

Later that afternoon, defendant visited his grandmother's house. When he walked in, he heard Bernard "ranting and raving" in a message he was leaving on the answering machine. Defendant then retrieved a shotgun from the gun cabinet, because "with him [Bernard] being unstable like that, I needed to have something with me, just in case." Defendant wrote a note to his mother

saying: “Daddy’s acting up. He could be on his way down. I went to get him. Love, Zack.”

Defendant drove up to Whitmore, realizing there was a possibility he might have to kill his father, but not intending to kill him. He decided to approach Bernard’s residence from the back, fearing that his father would shoot him if he came up to the front door. After loading the shotgun, defendant walked about a mile and half on an old logging trail toward the residence.

As defendant approached, he saw his father come out of the front door holding a rifle. Bernard shouted, “Zack, is that you?” and began shooting the rifle. Defendant heard shots and saw Bernard wheeling around toward him, so he aimed and fired his shotgun twice. Bernard fell to the ground.

Defendant ran up to his father’s fallen body. Because he was “scared” and Bernard still had the rifle in his hands, defendant struck him three times with the shotgun. He could see that Bernard had been shot in the left shoulder.

He took the rifle and shotgun and threw them up the driveway. He eventually put both guns in the house. Believing his father was still alive, defendant administered CPR to try to revive him. He also telephoned 911.

Forensic evidence

Pathologist Dr. Thomas Resk testified that Bernard died of a gunshot wound to his back. Toxicology tests revealed that Bernard had a 0.17 percent blood-alcohol level, a high level of

marijuana, and an “acute overdose” of the antidepressant drug Citalopram in his bloodstream at the time of his death.

The trajectory of the fatal gunshot wound was at a 45 degree downward angle. Dr. Resk opined that the shooter was standing 15 to 18 feet away from Bernard when he was shot. The angle was consistent with the shooter being elevated above the ground, or with Bernard being face down on the ground or in a hunched over position when he was shot. There were shotgun pellet holes in Bernard’s right palm and forearm, consistent with defensive wounds, but inconsistent with Bernard having held a weapon at the time of the blast.

Department of Justice criminologist Michael Barnes also testified. Based on follow-up tests he performed and the wounds to the deceased, Barnes estimated that the shotgun was fired from approximately 20 to 30 feet away.

Barnes found three expended .22-caliber rifle shells in the driveway area. The cartridges were further away than would be expected if Bernard had fired the rifle from where the body was found. Barnes could not determine if the spent shells had been fired that night. Because of the shotgun pattern wounds to Bernard’s right palm, Barnes concluded that he could not have been holding the rifle in his right hand. Barnes conceded, however, that the wounds were consistent with Bernard holding the rifle in his left hand, or bending over with his back parallel to the ground, at the time of the fatal shot.

Defendant was charged with second degree murder. The court instructed the jury on theories of both self-defense and imperfect self-defense. The jury returned with a verdict of "voluntary manslaughter: imperfect self-defense," as a lesser included offense.

Additional evidence will be set forth as it becomes relevant to our discussion of the issues.

DISCUSSION

I. Defendant's Facial Hair

Defendant advances four interrelated claims regarding the prosecutor's elicitation of evidence that he removed his facial hair before trial. Before dealing with them, we summarize the relevant facts.

Background

Investigator Wes Collette of the Shasta County Sheriff's Department came out to Bernard's residence in response to defendant's 911 call after the shooting. Collette identified defendant from a photograph that was taken of him on the night of his arrest. The photo shows defendant with a neatly trimmed beard. No objection was lodged, to either Collette's testimony or the photograph.

Detective Steve Grashoff also identified defendant from the same photograph. When the prosecutor asked if defendant "look[ed] any different that night than [the way] he does today," Grashoff said "[a] lot different," remarking "[h]e's done a good job of cleaning himself up for court purposes."

Defense counsel objected on grounds of speculation and asked that the answer be stricken. The court initially overruled the objection, but promptly reversed its ruling and admonished the jury to disregard Grashoff's comment.

The prosecutor then asked Investigator Grashoff to identify exhibit 41, a photograph of defendant that was taken on the Friday before jury selection in this case. The photo depicts defendant with a neatly trimmed goatee. When the prosecutor asked that exhibit 41 be admitted, the defense objected on grounds of relevance. The objection was overruled. Grashoff then testified that defendant was now clean shaven, in contrast to the way he looked about two weeks before.

The prosecutor returned to his change-of-appearance theme in his cross-examination of defendant. He asked defendant "So, it would be fair to say that since October of '02, the only two times you didn't have facial hair were the last time you testified under oath [during the first trial] and this time?" Defendant replied, "No, there were other times I was clean shaven." When the prosecutor asked when, defendant responded "Once, when I was in prison, I clean shaved up there. . . . And there was another time here where I decided to clean up, too."

Although no objection was lodged during this exchange, defense counsel later moved for a mistrial on the ground that his client's reference to being in prison created irremediable prejudice.

The trial court denied the motion for mistrial but did give a lengthy curative instruction, telling the jury that defendant "was previously tried in this case and was convicted and sent to prison" but, based on "substantial evidence error in that trial not caused [] by Mr. Farrell or the Prosecution, the appellate court reversed that conviction and ordered a new trial." The court went on to caution the jury against drawing any adverse inferences from the fact that defendant had been arrested or had been in custody, in either jail or state prison.

A. Admission of Exhibit 41

Taking his cue from trial counsel's argument that the prosecutor wanted the jury to believe that "[p]eople with beards are notoriously rotten people," who "are killers and they don't want the jury to know that, so they shave to come in here," defendant argues that the trial court abused its discretion in admitting exhibit 41, the photo of defendant bearing a goatee just several days before the commencement of trial. Defendant contends that since identity was not an issue, the only purpose of admitting the photo was to poison the jurors' minds by attributing some sinister purpose to the fact that he had shaved his facial hair just before trial.

Defendant makes a mountain out of a mole hill. The jurors already knew that defendant had facial hair at the time of the shooting through photographic exhibit 1, to which there was no objection. They could also see with their own eyes that he was clean shaven at the time of trial. The fact that defendant grew

a goatee and shaved it just before trial was of minimal importance. Only the most naïve juror would be oblivious to the fact that defendants normally clean themselves up to look presentable before trial.[3] We find no support for defendant's premise that jurors tend to view men with facial hair as "rotten people" or "killers." The claim is especially fatuous in light of the fact that the victim, Bernard, whom the prosecutor championed, wore a *full beard* at the time he was killed, as the jury could plainly see from viewing the autopsy photos. We fail to discern perceptible prejudice from the admission of exhibit 41.

B. Prosecutorial Misconduct

Defendant next claims the prosecutor committed prejudicial misconduct by asking him "when" was he clean shaven other than when he was testifying at trial. The question prompted defendant's response that he was clean shaven "in prison." Defendant argues that "it was misconduct for the prosecutor to delve into the area of either 'when' or 'where' [defendant] had been clean shaven . . . because such evidence was likely to disclose [defendant's] prison inmate status."

This claim is forfeited because defense counsel interposed no objection to either the prosecutor's question or defendant's answer. (*People v. Dykes* (2009) 46 Cal.4th 731, 763; *People v.*

[3] In any event, the court struck Investigator Grashoff's editorial comment that defendant had "clean[ed] himself up for court purposes," and told the jury to disregard it.

Prince (2007) 40 Cal.4th 1179, 1275.) Although counsel eventually did request a mistrial based on his client's unanticipated response, he did not base the motion on prosecutorial misconduct.

In any event, we find neither misconduct nor prejudice. The prosecutor cannot be charged with knowledge that defendant would blurt out a reference to his prison confinement in response to the question of *when* he was last clean shaven. Even defendant's attorney conceded in chambers that "I never in a million years thought that 'prison' was going to be the answer."

Furthermore, the trial court gave an extensive curative instruction, reminding the jury that they were to draw no adverse inferences from defendant's prison status. This instruction cured any prejudice from defendant's cursory reference to his incarceration. (See *People v. Friend* (2009) 47 Cal.4th 1, 63-64.)

C. Curative Instruction

Defendant takes issue with that part of the curative instruction that told the jury that the prior reversal of his conviction was "based on a substantial evidence error in that trial, *not caused* [] by [defendant] *or the Prosecution* . . . ." (Italics added.) Defendant complains the instruction was misleading because our prior reversal of the judgment included a finding of prosecutorial misconduct.

The claim is barred because defense counsel, James Dippery, not only participated in, but approved of the cited language in

the instruction. Dippery stated "I'm perfectly happ[y]--although reluctantly--to not attribute fault to Mr. Ledford [the prosecutor] in the prior trial." Dippery expressed satisfaction with an instruction telling the jury the appellate reversal was the fault of neither the defense nor the prosecution. Under the doctrine of invited error, a defendant may not complain of an erroneous instruction given at his own request. (*People v. Lucero* (2000) 23 Cal.4th 692, 723; *People v. Medina* (1990) 51 Cal.3d 870, 902; *People v. Daya* (1994) 29 Cal.App.4th 697, 713-714.)

D. Motion for Mistrial

Defendant claims his volunteered testimony that he was in prison created such irremediable prejudice that the trial court abused its discretion in denying his motion for mistrial. We disagree. "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

The trial court did not abuse its discretion in determining that defendant's brief, volunteered reference to his own imprisonment did not create incurable prejudice. The curative instruction told the jury to disregard the reference, and we

find nothing in the record to rebut the presumption that the jurors followed the court's admonition. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115, disapproved on a different ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Moreover, defendant may not be heard to seek a mistrial based on prejudice created by his own voluntary act. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.) Were the rule otherwise, a criminal defendant would have the unilateral power to write his own ticket to a new trial through intentional misconduct.

II. Motion for Acquittal

Defendant was charged with second degree murder. At the close of the prosecution's case, defense counsel filed a motion for a judgment of acquittal on the murder charge (§ 1118.1), claiming that since the prosecutor had relied on his own pretrial statements to prove the murder, and these statements irrefutably showed the absence of malice, the murder charge must be dismissed. The motion was denied.

Defendant replicates the same argument on appeal, claiming that his post-arrest statements to the police show conclusively that the killing was done without malice. He relies on the "*Toledo* doctrine" (*People v. Toledo* (1948) 85 Cal.App.2d 577), which holds that in a homicide prosecution, where the People rely solely on defendant's pretrial statements showing excuse or mitigation, they are bound by that evidence absent proof to the contrary. (*Id*. at pp. 580-581.) Defendant hypothesizes that

the jury might have been more receptive to a verdict of acquittal had the murder charge been stricken.

The so-called *Toledo* doctrine was discussed in *People v. Ross* (1979) 92 Cal.App.3d 391. The *Ross* court noted the doctrine "refers to a principle of judicial review invoked in homicide prosecutions obviating a defendant's burden of showing mitigation or justification where the prosecution's proof itself tends to show same or a lesser unlawful homicide. [Citations.] The rule in its amended form is properly restricted to those cases where '*all* the prosecution evidence points to excuse or mitigation. [However,] [i]f there is substantial evidence incompatible with the theory of excuse or mitigation, the jury may consider all the evidence and determine whether the act amounted to unlawful homicide.'" (*Id.* at p. 400, original italics omitted, our italics added.) The *Ross* opinion continued: "To the extent that the [*Toledo*] doctrine is founded upon a notion that the prosecution is bound by their witnesses' statements [citation] on the antiquated theory of vouchsafing one's own witnesses [citation], that theory has long since been discarded in favor of the modern rule allowing impeachment of a witness by any party, 'including the party calling him.' (Evid. Code, § 785; [citation].) In the final analysis the question of defendant's guilt must be resolved from *all* the evidence considered by the jury." (*Ross*, at p. 400.)

The *Toledo* doctrine, assuming it is still viable,[4] is inapplicable because the prosecution introduced abundant circumstantial evidence of malice. The following is only a partial list: (1) defendant armed himself with a shotgun and, ignoring his grandmother's pleas not to go out to Bernard's property, told her "I'm sorry, Grandma"; (2) defendant told his sister Marie just before he left that "something bad might happen"; (3) defendant approached Bernard's house from the back, waited for him to come out and then shot him in the back; (4) both forensic experts testified that the defensive pellet wounds to Bernard's right palm were inconsistent with the hypothesis that Bernard was holding a weapon in that hand when he was shot;[5] (5) both forensic experts opined that Bernard's injuries were consistent with a scenario in which the first shot brought him to his knees and the second wound was inflicted while he was lying face down; (6) the expended rifle shells were found at a location that was too far away to have been fired from the spot where Bernard's body was found; (7) blood stains consistent with Bernard's were found on the toe of defendant's shoe, indicating that defendant kicked Bernard while he was lying on the ground; and (8) the pathologist could find no objective evidence to support defendant's claim that he administered CPR to Bernard after the shooting.

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[4] See *People v. Burney* (2009) 47 Cal.4th 203, 248-249 (*Burney*).

[5] Dr. Resk went even further, concluding that Bernard's injuries were inconsistent with him "holding a weapon . . . or *anything* in his hands." (Italics added.)

The jury could also find evidence of malice in defendant's own pretrial statements, as illustrated by the following exchanges between defendant and Investigator Grashoff:

"[GRASHOFF]: . . . You got to pat yourself on the back for being honest right now. What, but I want you to tell me in your own words okay, what did you plan on doing up there. What, I mean, were you gonna fire a couple shots to scare him? Or, what were you gonna do?

"[DEFENDANT]: I just wanted to show up and, just show him that, the entire time he kept calling me 'bitch' and that I'd, I'd never did anything. And he just kept telling me I couldn't do it. [¶] . . . [¶]

"[GRASHOFF]: . . . [B]ut you didn't want your dad to do what? What were you saying?

"[DEFENDANT]: He was calling me names. He just kept calling me. He said I couldn't, I wouldn't do it, couldn't do it. There's no way I could beat him. There's no way I could, I could touch him because he was just so much better than me. I just wanted.

"[GRASHOFF]: Was he challenging you to come up?

"[DEFENDANT]: Yes he was. [¶] . . . [¶]

"[GRASHOFF]: Did he say he was gonna shoot you though? If you came up? So you're, you're basically, and be honest with me, you're going up there for, for a gunfight. To show him up?

"[DEFENDANT]: I just wanted.

"[GRASHOFF]: *You wanted to prove yourself*.

"[DEFENDANT]: *Yes*. [¶] . . . [¶]

"[GRASHOFF]: . . . Well, let me put it like this, you were mad at him because he called you a bitch, huh?

"[DEFENDANT]: It's for everything. For everything that, everything he's ever done. It, it's always, always been against us. It's always, it's never his fault. It's always us.

"[GRASHOFF]: Him against you, you and your mom and your sisters? And you were sticking up for your family. You *were gonna take care of business in your own hands*. Is that a 'yes'?

"[DEFENDANT]: *Yes, sir*. [¶] . . . [¶]

"[GRASHOFF]: I know you didn't want to do it. *But your dad made you angry tonight. And you wanted to prove that you were better than he*. I know you're shaking your head 'yes.' Right?

"[DEFENDANT]: Yes." (Italics added.)

These statements, considered in conjunction with defendant's behavior before and after the shooting, permitted a reasonable inference that defendant drove up to the Whitmore property having made a conscious decision to kill his father. Since there was plentiful evidence of malice, the motion for acquittal on the murder charge was properly denied.

III. Autopsy Photographs

Prior to trial, defendant made a motion in limine to preclude the prosecution from introducing two autopsy photographs on the ground that their prejudicial impact exceeded their probative value. The photographs (front and side views)

show Bernard's corpse with a rod inserted through it, to illustrate the angle of the fatal gunshot wound. The trial court denied the motion.

Defendant complains the admission of these "gruesome" photos served only to inflame the jury's emotions against him, and therefore the court's ruling was an abuse of discretion under Evidence Code section 352. We disagree.

The admission of autopsy photographs under Evidence Code section 352 is committed to the broad discretion of the trial court. (*Burney*, *supra*, 47 Cal.4th at p. 243.) A court abuses its discretion only when its ruling exceeds the bounds of reason. (*People v. Kipp* (1998) 18 Cal.4th 349, 371 (*Kipp*).) Here, the trial court correctly noted that because self-defense was such a critical issue in the case, it was "of paramount importance that the jury have photographic evidence of the location on the decedent's body where the lethal wound entry exists. Not only of the location, but also the trajectory." The court's observations were beyond reproach.

As the California Supreme Court held in *Burney*, although photographs of murder victims "often are graphic and disturbing," a trial court does not abuse its discretion in admitting them where they possess "substantial probative value" on the issue of malice. (*Burney*, *supra*, 47 Cal.4th at p. 243.) Such was the case here. The exact location and trajectory of the fatal wound were of critical importance to the issue of self-defense, especially in light of defendant's claim that

Bernard was turning toward him when he fired his shotgun. We agree with the trial judge's observation that the photographs did a "better job than any testimonial evidence could ever do in describing the shot pattern and the trajectory of the shot." No abuse of discretion appears.

IV. CALCRIM No. 361

The evidence showed the trajectory of the fatal shot that entered Bernard's back was at a 45-degree downward angle. If his father were standing upright on level ground, defendant would have had to be 25 feet *above the ground* to have inflicted a gunshot wound at that angle from 20 to 30 feet away. Thus, both experts testified that the most likely explanation of the wounds was that Bernard was either bent over with his body parallel to the ground or lying on the ground when the fatal shot was inflicted.

On cross-examination, defendant testified that both he and Bernard were upright and that Bernard was holding the rifle on his right shoulder when defendant shot him. The prosecutor then pursued the following line of questioning.

"[PROSECUTOR]: You weren't like 20 or 30 feet up in the tree?

"[DEFENDANT]: No.

"[PROSECUTOR]: Or on the roof, right?

"[DEFENDANT]: No.

"[PROSECUTOR]: Okay. And you shot twice and then he hit the ground?

"[DEFENDANT]: That's what I remember, yes.

"[PROSECUTOR]: Showing you [exhibit] 33. If you were both standing up and you were both on level ground, can you come up with any scenario that would explain how your shot hit him in a downward 45-degree angle?

"[DEFENDANT]: No, just–-

"[Defense objection overruled]

"[DEFENDANT]: No. Just the theories that my lawyer's come up with. *I can't explain it*." (Italics added.)

When asked what theory he was referring to, defendant said "[t]he one where [Bernard's] bending over," and "picking up his rifle." The prosecutor then had defendant confirm that he never saw Bernard drop the rifle. He then asked, "Assuming he--what you saw is what happened and he never dropped his rifle, do you have another theory as to how your shot could have gone into him in a downward 45-degree angle?" Defendant responded, "No, I do not."

Both experts also agreed that the pellet wounds to Bernard's right palm were "defensive wounds" that were inconsistent with his holding a weapon when he was shot. When the prosecutor also asked defendant to explain how, if Bernard was holding the rifle up against his shoulder and with his right hand, he could have sustained the pellet wounds to his right palm, defendant responded, "I have no idea. I couldn't explain it."

The court instructed with CALCRIM No. 361, which tells the jury that "[i]f the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

Defendant argues there was no evidentiary basis for giving this instruction because he explained the evidence against him "to the best of his ability." The claim is frivolous. As set forth above, the prosecutor confronted defendant with at least two instances in which the objective evidence was blatantly inconsistent with defendant's version of the shooting. Each time, when asked for an explanation defendant admitted he did not have one. The jury was permitted, but not required, to infer from this testimony that defendant's failure to offer satisfactory explanations showed consciousness of guilt. A more appropriate case for giving CALCRIM No. 361 is hard to imagine.

V. CALCRIM No. 362

The court also gave CALCRIM No. 362, which told the jury in part that "[i]f the defendant made a false or misleading statement relating to the charged crime," and knew the statement was false with the intent to mislead, "that conduct may show he

was aware of his guilt of the crime and you may consider it in determining his guilt."

Defendant contends that any statements that might have been false or misleading "did not compel the shining of the bright light of CALCRIM [No.] 362 upon them." He also complains that the instruction is an improper "pinpoint" instruction, favorable to the prosecution.

CALCRIM No. 362, the successor to former CALJIC No. 2.03, tells the jury that if a defendant makes a knowingly false or intentionally misleading statement relating to the crime charged, that statement may show an awareness of guilt. The instruction "is justified when there exists evidence that the defendant prefabricated a story to explain his conduct." (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103.)

Here, defendant made a plethora of statements after the homicide that could be deemed to be false or intentionally misleading. We list only a few:

(1) During questioning by Investigator Grashoff, defendant denied that he had written a note for his mother just before he left for Bernard's residence. At trial, defendant was confronted with the potentially incriminating note and was forced to admit that he wrote it and left it for her.

(2) In his interview with sheriff's deputies, defendant said that after the shooting he merely ran up to his father and said "[W]hat's going on, Dad?" At trial, however, defendant

testified that after the shooting, he yelled at his father to "stay on the ground" and "let go of the gun," and clubbed him three times with the shotgun.

(3) Defendant denied kicking his father at any time after the shooting. The pathologist, however, found a large blood stain of Bernard's blood type on the toe of defendant's shoe, consistent with defendant's having kicked the body while it was lying on the ground.

(4) Both at trial and during his pretrial interviews, defendant claimed that he administered CPR in an attempt to resuscitate Bernard after the shooting. Yet the pathologist who examined Bernard's body found no evidence whatsoever that CPR had been administered.

A reasonable juror could view all of these as false or misleading statements relating to the charged crime. Thus, the instruction was properly given.

Defendant's argument that CALCRIM No. 362 is an improper pinpoint instruction skewed toward the prosecution also fails. CALCRIM No. 362 is the successor to CALJIC No. 2.03, regarding consciousness of guilt and false statements. The California Supreme Court has repeatedly rejected the argument that CALJIC No. 2.03 is an impermissible pinpoint instruction. (*Kipp*, *supra*, 18 Cal.4th at p. 375; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224; *People v. Arias* (1996) 13 Cal.4th 92, 142.) Relying primarily on this precedent, this court has also rejected the same argument as directed to CALCRIM No. 362.

(*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103-1104.) We stand by our decision.

VI. Cumulative Error

Defendant claims that even if the errors he complains of are not prejudicial when individually considered, their cumulative impact requires reversal. Because we find none of the claims of error meritorious, a cumulative error argument cannot be sustained.

VII. Section 4019

The recent amendments to section 4019 do not entitle defendant to additional time credits, as he was committed in this case for a "serious" felony. (§ 4019, subds. (b)(1), (2) & (c)(1), (2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) The voluntary manslaughter conviction precludes additional conduct credits. (§ 1192.7, subd. (c)(1).)

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.